NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 07 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KEENAN ROBERSON, Petitioner-Appellant, v. DERRAL G. ADAMS, Warden SATF & State Prison at Corcoran Respondent -Appellee.	No. 04-57201 D.C. CV-01-08799-SJO MEMORANDUM[*]

On Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted October 18, 2005
Pasadena, California

Before: FRIEDMAN[**], O'SCANNLAIN, and PAEZ, Circuit Judges.

In this federal habeas corpus proceeding, the appellant Keenan Roberson challenges his California jury conviction of attempted willful, deliberate pre-meditated murder, for which he was sentenced to life imprisonment. Roberson

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

[**] Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

contends that he was denied effective assistance of counsel when his attorney advised him to reject a plea agreement under which he would have received a 13-year term of imprisonment, and to go to trial, and again when his attorney failed to seek a ten year plea agreement.

The district court properly recognized that federal habeas review is limited by the standard set in 28 U.S.C. § 2254(d). The district court concluded that Roberson had failed to show that the state court decision rejecting his claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). We agree.

In its opinion in the federal habeas proceeding, the district court stated that the attorney so advised Roberson because she believed she "had a triable case" and because she "also believed that a 13-year sentence was too high." In hindsight, counsel's advice appears to have been mistaken. Whether an attorney's advice constituted ineffective assistance of counsel, however, must be determined on the basis of the situation as the attorney saw it when she gave the advice and not on the basis of a hindsight analysis of the correctness of that advice. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight . . . and to evaluate the conduct from counsel's perspective at the time."). Although the attorney's advice in this case turned out to have been unwise, we cannot say it constituted ineffective assistance of counsel under our "highly deferential" "scrutiny of counsel's performance." *Id*.

Roberson also contends that his attorney's assistance was ineffective because she failed to pursue with the prosecution the possibility of obtaining a 10-year sentence, which his predecessor attorney had discussed with the prosecution. The only argument he made on this point in his state habeas proceeding, however, was that counsel had failed to inform him of the existence of a firm 10-year offer. The state court rejected this contention because it found that no firm 10-year offer had been made. Roberson's present contention on this issue thus was not raised in the state habeas proceeding, and as an "unexhausted" contention, it is not open to him in a federal habeas proceeding. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Picard v. Connor*, 404 U.S. 270, 275 (1971).

To the extent Roberson contends that his counsel's assistance at trial itself was ineffective, we decline to consider this argument because it was not certified for appeal. *See Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (per curiam); 9th Cir. R. 22-1.

The judgment of the district court denying habeas corpus is affirmed.

AFFIRMED